IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-249

ROGER L. SPENCER, ET UX,

Petitioners,

versus

SOUTH CAROLINA TAX COMMISSION, ET AL.,

Respondents.

BRIEF FOR THE RESPONDENTS

T. TRAVIS MEDLOCK
Attorney General

JOE L. ALLEN, JR.
Chief Deputy Attorney General

RAY N. STEVENS
Senior Assistant Attorney General

Post Office Box 125
Columbia, S.C. 29214

ATTORNEYS FOR RESPONDENTS.

QUESTION PRESENTED

Is a state court required to entertain the remedy of 42 U.S.C. § 1983 where the state has nondiscriminatory laws limiting its jurisdiction and where such remedy is sought to be used in a dispute concerning state income taxes for which the state provides an adequate remedy?

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TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional Provisions and Statutes involved set forth by the petitioners need to be supplemented by the following:

State and Local Fiscal Assistance Act of 1972, 26 U.S.C. §§ 6361-6365 (Brief of Respondents, Appendix A, page 1a)

South Carolina Code of Laws, 1976, as amended, § 12-47-10 (Brief of Respondents, footnote 17)

South Carolina Code of Laws, 1976, as amended, § 12-47-50 (Brief of Respondents, footnote 18)

South Carolina Code of Laws, 1976, as amended, § 15-53-20 (Brief of Respondents, footnote 22)

South Carolina Code of Laws, 1976, as amended, § 15-53-30 (Brief of Respondents, footnote 23)

SUMMARY OF ARGUMENT

The decision of the South Carolina Supreme Court to decline the remedy of 42 U.S.C. § 1983 sought by the petitioners in a tax dispute was

proper since such refusal was nondiscriminatory in that state-created remedies would likewise have been dismissed. Further, neither the literal language of § 1983, the legislative history of such enactment, nor the history of subsequent congressional state tax enactments express any intent to impose upon the states a mandatory state tax remedy. On the contrary, such legislative history demonstrates Congress intended states to administer their own revenue systems without mandatory remedies imposed by Congress.

I

The United States Constitution under the Supremacy Clause does not require that a federal remedy be entertained by a state court where a neutral nondiscriminatory state provision

prohibits hearing both state and federal actions. This nondiscrimination rule has been established in Mondou v. New York, N.H.& H.R.R., 223 U.S. 1, 32 S.Ct. 169 (1912) and Testa v. Katt, 330 U.S. 386, 67 S.Ct. 810 (1947), and it is further established that lack of subject matter jurisdiction of the state court is a proper reason for declining a federal remedy so long as such lack of jurisdiction is applied in a nondiscriminatory manner. Mondou, supra, Testa, supra and Herb v. Pitcairn, 324 U.S. 122, 65 S.Ct. 459 (1945).

In the instant case, the South Carolina courts properly declined the § 1983 remedy since their subject matter jurisdiction over tax disputes by a taxpayer is limited by §§ 12-47-10[1] and

[1]See footnote 17 for the exact language of § 12-47-10.

12-47-50[2], South Carolina Code of Laws, 1976, as amended. Such sections limit the jurisdiction of South Carolina's courts by specifying that no remedy other than those identified in Chapter 47 of Title 12, South Carolina Code of Laws, 1976, shall be allowed and specify that no order or process of any kind shall be issued by any court so as to interfere with state tax collection. This lack of jurisdiction rule applies to state as well as federal claims on a nondiscriminatory basis. For example, South Carolina courts have consistently and repeatedly denied the state-created declaratory judgment remedy[3] and the remedy of an injunction[4] when sought by

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[2]See footnote 18 for the exact language of § 12-47-50.

[3] See text accompanying footnote 26.

[4] See text accompanying footnote 27.

a taxpayer in a tax dispute. In short, South Carolina's courts are closed to all parties seeking remedies other than those remedies for which jurisdiction has been granted. Since the South Carolina courts had no jurisdiction over § 1983 remedies concerning taxes and since such jurisdictional limitation is applied on a nondiscriminatory basis to all remedies whether state or federal, South Carolina's decision to not entertain the remedy of § 1983 was proper.

Further, it is clear under Georgia R.R. & Banking Co. v. Musgrove, 335 U.S. 900 (1949) and Ward v. Love County, 253 U.S. 17 (1920), that as long as the State has provided an adequate remedy, the Constitution does not compel a state to disregard its lack of jurisdiction nor to require the state court to

provide an avenue for a federal remedy. Here the remedy of payment under protest with suit within thirty days as provided by § 12-7-220[5], South Carolina Code of Laws, 1976, as amended, is an adequate remedy. Such satisfies the requirements of an adequate remedy explained in Rosewell v. LaSalle National Bank, 450 U.S. 503, 101 S.Ct. 1221, 1229 (1981), since a taxpayer under § 12-47-220 may raise any and all constitutional objections he wishes to assert.

II

Congress has not enacted a mandatory state tax remedy upon state courts through § 1983. Neither the literal language nor the congressional intent found in the legislative history

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[5] See Petition for Writ of Certiorari at Appendix E, page 26 for exact language of § 12-7-220.

of the statute demonstrates such an intent. In fact, subsequent acts of Congress show congressional intent that the states administer their own tax systems unimpeded by federal intervention.

In deciding if § 1983 creates a mandatory state tax remedy in state court, the literal language of the statute is of little help. The statute provides a remedy but gives no guidance on where such remedy is to be obtained nor does the language address the appropriateness of such a remedy for litigating a state tax dispute in state court. In light of such, the legislative history of § 1983 and subsequent acts of Congress dealing with the same subject of state taxation for which § 1983 is now being asserted become relevant to determine legislative intent.

The legislative history of § 1983 as reviewed in Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473 (1961), demonstrates that such was primarily designed to provide a federal remedy in a federal court and Patsy v. Board of Regents of State of Florida, 457 U.S. 496, 102 S.Ct. 2557, 2562, found § 1983 to be designed to "throw open the doors of the United States Court". Thus, there is no indication in the legislative history that the statute was addressed at either state tax systems or mandatory state acceptance of such actions.

However, the legislative history of the Tax Injunction Act, 28 U.S.C. 1341,[6] and the State and Local Fiscal Assistance Act of 1972, 26 U.S.C.

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[6]See Petition for Writ of Certiorari at Appendix E, page 25a for exact language of 28 U.S.C. § 1341.

§§ 6361-6365[7] demonstrate Congress acknowledged and accepted the basic payment under protest remedy utilized in state tax systems. The legislative history of § 1341 shows Congress was concerned with foreign corporations obtaining injunctions against state taxes and not paying the tax before suit thus impeding state tax collection. Local citizens were unable to use the injunction route. A view that § 1983 is mandatory will give the very result Congress sought to remove under § 1341 since any taxpayer who can structure his complaint under § 1983 would be able to proceed to court without having paid the tax. Thus, the state would be deprived of its revenue until the action was ended. Since the view of § 1983

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[7]See Brief for the Respondents at Appendix A, page 1a for pertinent parts of exact language of 26 U.S.C. § 6361.

advanced by the petitioners is directly contrary to the intent of § 1341, § 1983 cannot be mandatory upon state courts in tax disputes. Likewise, the history of § 1341 shows Congress knew that states required exhaustion of administrative remedies and approved of such. However if § 1983 is a mandatory state tax remedy in state court, Patsy, supra, eliminates such requirement and again the intent of Congress in § 1341 would be defeated by petitioners' view of § 1983.

Further, Congress showed no inclination toward a mandatory state tax remedy in state court in its enactment of the State and Local Fiscal Assistance Act. There Congress authorized the Federal Government, with the states' consent, to collect state income taxes and litigate any disputes arising from such taxes. However, states were not

required to accept such an offer. Thus, Congress expressed an intent to become involved in state tax systems only on a purely voluntary basis fully acceptable to the state. Such a voluntary approach is directly contrary to the mandatory approach advanced by petitioners.

Finally, § 1983, neither in its language nor history, makes the necessary clear statement of intent required of Congress where Congress seeks to invade a fundamental state area such as a state tax system. Also, such a mandatory view of § 1983 for tax disputes in state court would in many instances abrogate the state's sovereign immunity which view also requires a clear statement of such being the intent of Congress. Quern v. Jordan, 440 U.S. 332, 99 S.Ct. 1139 (1979), holds that § 1983 expresses no such clear statement to abrogate state

sovereignty. Since Congress in § 1983 has made no clear statement of its intent to invade such a fundamental state interest as a state's fiscal lifeblood or to abrogate the state's sovereign immunity, this court should not hold § 1983 to be a mandatory state tax remedy in state courts. If such a decision is to be made, Congress is the body that should make it. There the opportunity for debate and fact finding would insure the protection of the interest of all parties, be they states or taxpayers. Section 1983 and its history simply do not yield the evidence to support congressional intent to subject states to federally imposed state tax remedies in the states' own courts. In the absence of such evidence, § 1983 was properly declined by the South Carolina Supreme Court and its decision to so decline should be upheld.

ARGUMENT

South Carolina's refusal to entertain the 1983 action in the instant case is proper since the refusal is not a violation of the United States Constitution; acceptance of the action is not compelled by the language of § 1983; and congressional intent demonstrates that state tax matters shall be pursued in state courts in a manner determined by the state.

I. The Constitution Does Not Obligate State Courts To Entertain An Action Pursuant To § 1983 Where Such Concerns State Taxes.

A. The Supremacy Clause[8] does not

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[8]The Supremacy Clause, Article VI, § 2: This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be

require a state court to entertain a § 1983 action where there is no discrimination against the federal claim resulting from the refusal of such claim. This Court has on several occasions addressed the issue of a state court declining to entertain a federal remedy. Such cases, as analyzed below, hold that no Supremacy Clause violation occurs where the state rule treats both state and federal claims the same. In other words, where there is no discrimination against the federal claim there is no constitutional violation.

In Mondou v. New York, N.H. & H.R.R., 223 U.S. 1, 32 S.Ct. 169 (1912),

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> the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

a citizen of Connecticut sued his employer in the state courts of Connecticut pursuant to the Federal Employers Liability Act (FELA). The Connecticut Supreme Court held that a right of action under the FELA could not be enforced in state court since the policy of Connecticut was not in accord with the federal law[9] and to enforce such a law would be "inconvenient and confusing". Mondou 32 S.Ct. at 177.

This Court found these reasons to be insufficient. Further the Court found Connecticut did entertain

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[9] Mondou 32 S.Ct. at 171. There was a conflict between state and federal policies. For example, the FELA abrogated the fellow-servant rule, extended a carrier's liability to cases of death and restricted the defenses of contributory negligence and assumption of risk, all of which opposed Connecticut's policies. Mondou 32 S.Ct. at 174-175.

analogous rights created under its law but denied enforcement of the federal right. The case was remanded for further proceedings thereby directing the state to entertain the action. However, in the opinion, the following was specifically noted:

> "* * * we deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion, and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress, and susceptible of adjudication according to the prevailing rules of procedure." Mondou 32 S.Ct. at 178.

As a result of Mondou, it became clear that a state would not be required to entertain a federal cause of action

if the state under "its ordinary jurisdiction as prescribed by local law" would not entertain state created causes of actions. In other words, lack of jurisdiction applied to the federal claim in a manner which is nondiscriminatory is a valid basis for not entertaining such claim. This rule was reaffirmed in Minneapolis & St. Louis R. R. v. Bombolis, 241 U. S. 211, 36 S. Ct. 595 (1916) where the Court held that "the principle upon which the Mondou case rested"[10] was that the state court would enforce the federal right not because the duty came from the federal government, but rather because its ordinary jurisdiction allowed it "within the scope of its authority".[11]

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[10] Bombolis 36 S.Ct. at 598-599.

[11] Ibid.

The nondiscrimination view of Mondou, was most clearly presented in Douglas v. New York, N.H. & N.H. & H. Railroad, 279 U.S. 377, 49 S.Ct. 355, 356 (1929). There this Court held that the FELA did not require state courts to entertain such suits where there was a valid excuse for so declining. The Court in Douglas found that a valid excuse for not entertaining the FELA suit was the fact that New York declined the federal cause of action on the same grounds that it would have declined New York's causes of action.[12]

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[12]A Connecticut resident brought an action against a Connecticut corporation for an injury which occurred in Connecticut. However, the action was brought in New York's courts. The New York court dismissed the action since its law provided that nonresidents could sue foreign corporations in New York's courts only in certain classes of cases. The current action did not fall within the special classes. The court found that the statute would also limit

The nondiscrimination rule was again applied in McKnett v. St. Louis & S. F. Railway, 292 U.S. 230, 54 S.Ct. 690 (1934). Alabama had a statute which discriminated against the FELA claim by allowing suits in its courts on state claims that were based upon its own laws or laws of sister states but would not entertain claims that arose from federal law.[13] Since such a statute clearly discriminated against the federal claim, the Court

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citizens of New York who were nonresidents of New York. Since New York would have dismissed an analogous state claim on the same grounds it dismissed the federal claim, there was no discrimination and hence a "valid excuse" for dismissing the FELA claim.

[13]Alabama's courts had general jurisdiction over the class of actions to which the FELA claim belonged and thus would have enforced state created claims. McKnett 54 S.Ct. at 691.

reversed Alabama's decision denying jurisdiction.

The view expressed in Mondou was firmly established by 1945 when the Court again examined an FELA action brought in state court. In Herb v. Pitcairn, 324 U.S. 122, 65 S.Ct. 459 (1945), the Illinois Supreme Court found that no action had been commenced in its courts within the two year period required by the federal act since such action had been brought in a city court that had no jurisdiction.[14] The issue in Pitcairn in this Court of whether an action had been commenced within the two

[14]The city court had no jurisdiction since in Weiner v. Illinois Central R. Co., 42 N.E. 2d 82 (1942) and Mitchell v. Louisville & N.R. Co., 42 N.E. 2d 86 (1942), the Illinois Supreme Court found that city courts lacked subject matter jurisdiction of causes of action that arose outside the city in which the court was located. In the Pitcairn case, the action arose outside the city in which the action was brought.

year period was left unanswered.[15] After finding that the limits of the jurisdiction of an Illinois court is a state law question, this Court found that the jurisdictional rules were not used to discriminate against the FELA

[15]This Court was not able to decide the issue since the Illinois Supreme Court used other state grounds for supporting its decision and it was uncertain upon which ground the case was decided. Since this Court is reluctant to review a case which may have been decided upon an adequate state ground, the causes were continued to allow the parties to petition the Illinois Supreme Court for clarification. In clarification reported in 64 N.E. 2d 318 (1945), Illinois found that the two year period had expired since commencing an action means starting it in a court that has power to decide the matter. This Court in Herb v. Pitcairn, 325 U.S. 77, 65 S. Ct. 954 (1945) disagreed and found that commencing an action under an FELA claim began with service of process. Thereupon the matter was remanded to the Supreme Court of Illinois for further proceedings not inconsistent with the opinion. Since such service was within two years the action was timely.

claim since state law claims would also have been dismissed. Pitcairn 65 S.Ct. at 462. This Court held that if the FELA claim was dismissed on such a ground that such dismissal would have been proper. Thus the rule of there being no discrimination in dismissing federal claims where state claims would also be dismissed was again applied.

Nondiscrimination was again the approach applied two years later in Testa v. Katt, 330 U.S. 386, 67 S.Ct. 810 (1947). There a plaintiff attempted to use the courts of Rhode Island to recover on a federal claim under Section 205(e) of the Emergency Price Control Act. The act allowed treble damages for violations of the act. However, just as in Mondou, supra, Rhode Island's policies were in conflict with the

federal policy, since Rhode Island did not enforce penal statutes and the federal claim was found by Rhode Island to be such a statute. Testa 67 S.Ct. at 812. Thus, Rhode Island refused to entertain the federal claim.

In reversing the Rhode Island Supreme Court's decision, Testa utilized the nondiscrimination analysis. Testa found that since in fact Rhode Island enforced other "penal" statutes (the double damages under the Fair Labor Standards Act, 29 U.S.C.A. § 201), the Rhode Island courts had jurisdiction over penal statutes. To refuse the treble damages of the Emergency Price Control Act would be discriminatory and therefore forbidden. Testa 67 S.Ct. at 814-815.

The site of authority in Testa to McKnett, supra, is enlightening since

that case concerned a statute which flagrantly discriminated against an FELA claim. Likewise, the instruction by Testa to compare Pitcairn, supra, further shows reliance upon the nondiscrimination rule since Pitcairn found a valid refusal for not hearing an FELA suit was the equal treatment of state and federal claims.

Further support for the view that Testa was based on a nondiscrimination analysis is found in the recent case of this Court in Federal Energy Regulatory Commission v. Mississippi, 456 U.S. 742, 102 S.Ct. 2126 (1982). Section 210 of the Public Utility Regulatory Policies Act (PURPA) required each state utility regulatory authority to "adjudicate disputes arising under the statute". FERC v. Mississippi 102 S.Ct. at 2137.

This Court cited both Testa and Mondou in finding there was no limitation on the Mississippi Commission's jurisdiction under local law to entertain claims under PURPA. Thus, the jurisdiction to hear the PURPA claim prevented declining such claim since such would be discriminating against the federal claim. Justice O'Connor and Justice Powell in each of their concurring and dissenting opinions agreed with the nondiscriminatory view. FERC v. Mississippi 102 S.Ct. at 2146 and 2145.

Finally, only three years after Testa, Missouri ex rel Southern Ry. v. Mayfield, 340 U.S. 1, 71 S.Ct. 1 (1950), was decided utilizing the nondiscrimination approach in an FELA action.[16] Missouri found that it had no

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[16]The action was brought in Missouri's

choice but to deny the request to apply forum non conveniens. Upon review, this Court found that nothing prohibited a state court from applying the forum non conveniens rule in FELA actions so long as it applied the rule to state claims in the same manner and thus did not discriminate against the federal claim. Mayfield 71 S.Ct. at 3.

state courts. Nonresidents were seeking recoveries from a foreign corporation for injuries which were not incurred in Missouri. Thus much as in Douglas, supra, the primary contacts were outside of Missouri. Motions invoking the doctrine of forum non conveniens were filed by the defendants but denied by the trial court. Writs of Mandamus were sought from the Missouri Supreme Court to compel the trial court to apply the doctrine. The Missouri Supreme Court refused to compel the trial court to grant the relief sought. The Court held that the trial court was required to entertain the FELA action since it allowed Missouri citizens to entertain such actions. Because of such, it could not dismiss an FELA action filed by a nonresident. State ex rel Southern Ry. Co. v. Mayfield, 224 S.W. 2d. 105 (1949).

These cases establish the nondiscrimination rule and Testa, supra, specifically recognizes that the lack of subject matter jurisdiction is a proper nondiscriminatory basis for declining a federal cause of action. As the following discussion demonstrates, the South Carolina courts properly declined the § 1983 claim since their jurisdiction did not extend to such claims.

B. By declining to hear the § 1983 claim because of a lack of subject matter jurisdiction, the South Carolina courts did not discriminate against such claim since lack of jurisdiction, when applied to both state and federal remedies, is proper under Testa, supra. Testa v. Katt, 330 U.S. 386, 67 S.Ct. 810, 815. South Carolina courts have limited jurisdiction in actions brought

by taxpayers challenging a tax assessment with such limitations being set forth by § 12-47-10[17], South Carolina Code of Laws, 1976, as amended, and § 12-47-50[18] South Carolina Code of Laws, 1976, as amended[19]. Thus, South

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[17]The collection of State, county, city, town and school taxes and taxes voted by townships in aid of railroads when the roads have been completed through such townships shall not be stayed or prevented by any injunction, writ or order issued by any court or judge. And no writ, order or process of any kind whatsoever staying or preventing the Tax Commission or any officer of the State charged with a duty in the collection of taxes from taking any steps or proceeding in the collection of any tax, whether such tax is legally due or not, shall in any case be granted by any court or the judge of any court.

[18]There shall be no other remedy than those provided in this chapter in any case of the illegal or wrongful (a) collection of taxes, (b) attempt to collect taxes or (c) attempt to collect taxes in funds or moneys which the county treasurer shall be authorized to receive under the law other than such as the person charged with such taxes may tender or claim the right to pay.

[19]At page 20 of petitioners' Brief, petitioners assert that no one has questioned the state court's jurisdiction over the Spencers' federal cause of action, that the South Carolina Supreme Court admitted it had jurisdiction, and that respondents conceded that the state courts have jurisdiction. Such assertions are a flagrant disregard of the record before this Court. The Transcript of Record before the South Carolina Supreme Court, at page 2 in the Statement of the Case, shows the respondents' position was that "the court is without jurisdiction to hear the action, * * *." Again in the Transcript before the South Carolina Supreme Court, at page 19, the entire Fourth Defense challenges the court's jurisdiction and directly disputes jurisdiction under § 1983. The oral argument before the trial court, at page 30 of the Transcript of Record from lines 20-22, asserts that only § 12-47-220 can confer jurisdiction on the court. The respondents' Brief to the South Carolina Supreme Court, at page 7, directly cites §§ 12-47-10 and 12-47-50, which statutes are limitations denying jurisdiction. The South Carolina

Carolina's courts are closed to all

Supreme Court by merely recognizing that Martinez v. State of California, 444 U.S. 277 (1980) and Maine v. Thiboutot, 448 U.S. 1 (1980) allow concurrent jurisdiction certainly did not make a statement that South Carolina courts had jurisdiction. Likewise, respondents' Statement, at page 4 of its Brief in Opposition, was not a concession that South Carolina courts had jurisdiction. Such was meant only to assert that the mere existence of and finding of concurrent jurisdiction was not sufficient to require state courts to accept jurisdiction. In fact, one of the cases cited, at page 4, to support such position was Herb v. Pitcairn, supra, which itself was based on a court declining an FELA claim where there was lack of jurisdiction.
Petitioners' assertions are most puzzling not only in light of the record before the court but also in light of the rule that subject matter jurisdiction may be raised at any time and this court may inquire into the jurisdiction of the lower court even if such was conceded (which is clearly not the case here) in the State Supreme Court. Seaboard Air Line R. Co. v. Daniel, 333 U.S. 118, 68 S.Ct. 426 (1948). Based upon the record and the nonwaivability of subject matter jurisdiction, the petitioners' assertions are patently inaccurate.

parties who seek to challenge a state income tax assessment in a manner other than under the remedies for which jurisdiction is provided by the General Assembly in Chapter 47 of Title 12, South Carolina Code of Laws, 1976, as amended. Such is true whether the remedy is state created, such as declaratory judgment or injunction, or whether the remedy is a federal creation such as § 1983. Such uniform treatment by the state resulting from limits imposed by "its ordinary jurisdiction as prescribed by local law"[20] shows no discrimination and is a proper basis for not entertaining the § 1983 claim.[21]

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[20] Mondou, supra, 32 S.Ct. at 178.

[21] Brilmayer & Underhill, Constitutional Obligation to Provide a Forum for Constitutional Claims: Discriminatory Jurisdictional Rules and the Conflict of Laws, 69 Virginia Law Review 819 at 838.

South Carolina's courts have declined state claims by taxpayers challenging tax statutes on the basis of lack of jurisdiction on several occasions. In Elmwood Cemetery Association v. Wasson, 253 S.C. 76, 169 S.E.2d 148 (1969), a taxpayer sought to utilize both a declaratory remedy as well as an injunctive remedy. The declaration sought was that the taxpayer was exempt from income tax and the injunctive remedy sought to restrain the Tax Commission from assessing or collecting any tax against the taxpayer. The South Carolina Supreme Court declined to grant either remedy by finding that state law was clear in holding that only the remedy of payment

"States may refuse to adjudicate federal claims when the jurisdictional restriction applies neutrally to exclude claims based on state laws as well."

under protest and suit within thirty days under what is now § 12-47-220 was provided by the General Assembly of South Carolina.

A further limitation of the court's jurisdiction was explained in a later action of Elmwood Cemetery Association v. South Carolina Tax Commission, 255 S.C. 457, 179 S.E. 2d 609 (1971). A single assessment for multiple tax years was made by the Tax Commission. The taxpayer attempted to combine two remedies in one action. One remedy complied with the payment under protest provision as to a tax liability for the tax year 1949 while the other remedy was a declaratory remedy seeking a declaration that the corporation was exempt for tax years after 1949. The South Carolina Supreme Court found that

even though an action was properly before it under § 12-47-220, it had jurisdiction only over the remedy provided in that section. Thus, only the 1949 tax year was before the court, whereas the court was "without jurisdiction" of the declaratory remedy. Elmwood 179 S.E.2d at 611-612.

The similar situation existed in the instant case. The petitioners established their remedy under § 12-47-220 by paying the tax under protest and bringing an action at law within thirty days. The petitioners added a remedy under declaratory relief seeking to establish jurisdiction under § 15-53-20[22], South Carolina Code of

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[22]Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not

Laws and § 15-53-30[23], South Carolina Code of Laws, 1976, as amended.[24]

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further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect. Such declarations shall have the force and effect of a final judgment or decree.

[23]Any person interested under a deed, will, written contract or other writings constituting a contract or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

[24]Transcript of Record before the South Carolina Supreme Court, Amended Complaint, page 7, allegations at paragraph IV. It should be noted that petitioners cited § 15-77-50 as a jurisdiction-granting section also in

Further a remedy under § 1983 was added.[25] The denial of the declaratory remedy for lack of jurisdiction is clear under Elmwood Cemetery Association v. Wasson, supra, and Elmwood Cemetery Association v. South Carolina Tax Commission, supra, since the court only had jurisdiction over the exclusive remedy of § 12-47-220.[26] Likewise the

paragraph IV. However, Harrison v. South Carolina Tax Commission, 261 S.C. 302, 199 S.E. 2d 763 (1973), provides that such section grants no jurisdiction to sue the Tax Commission but rather is only a venue statute.

[25]Transcript of Record before the South Carolina Supreme Court at page 13, Amended Complaint, allegation XXII.

[26]The holding of Elmwood Cemetery Association v. Wasson, supra, denying jurisdiction over declaratory remedies was also confirmed in Perpetual Building and Loan Association v. South Carolina Tax Commission, 255 S. C. 523, 180 S. E. 2d 195, 197 (1971).

lack of jurisdiction over § 1983 is apparent for the same reason of exclusive remedies denying jurisdiction pursuant to § 12-47-10 and § 12-47-50. Thus state and federal claims are uniformly submitted to the same jurisdictional limitations.

The remedy of injunction has also been denied to state law claims due to the adequate remedy of § 12-47-220 and exclusiveness limitations on jurisdiction placed by § 12-47-50. In repeated instances, the South Carolina Supreme Court has affirmed the view that its courts have no jurisdiction to issue an injunction where § 12-47-220 is involved since such section is an adequate remedy.[27]

[27]Fleming v. Power, 77 S.C. 528, 58 S.E. 430 (1907), Ware Shoals Mfg. Co. v. Jones, 78 S.C. 211, 58 S.E. 811 (1907),

It is established that a state court need not entertain a federal remedy unless the state's "ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion". Testa, 67 S.Ct. at 815 and Mondou, 32 S.Ct. 178. The South Carolina courts have limited jurisdiction over challenges to a tax liability as in the instant case. Sections 12-47-10 and 12-47-50. The limitations on the jurisdiction of the South Carolina

Aetna Fire Ins. Co. v. Jones, 78 S.C. 445, 59 S.E. 148 (1907), Ex Parte Tillman, 84 S.C. 552, 66 S.E. 1049 (1910), Bank of Johnston, et al. v. Prince, 136 S.C. 439, 134 S.E. 387 (1926), Western Union Tel. Co. v. Query, 144 S.C. 234, 142 S.E. 509 (1927), Santee River Cypress Co. v. Query, 168 S.C. 112, 167 S.E. 22 (1932), Sutton, et al. v. Town of Fort Mill, 171 S.C. 291, 172 S.E. 119 (1933), Home Building and Loan v. City of Spartanburg, 185 S.C. 353, 194 S.E. 143 (1937), Textile Hall Corp. v. Riddle, 207 S.C. 291, 35 S.E.2d 701 (1945), Prudential Ins. Co. v. Murphy, 207 S.C. 324, 35 S.E.2d 586 (1945).

courts have been applied to prohibit state created claims on numerous occasions and have been the law in South Carolina since the 1870's.[28] Since the

[28]The prohibition on injunction, writs or orders which prevent efforts to collect taxes was enacted on February 28, 1870 (14 Stat. 367) and was found as a constitutional limitation of the courts jurisdiction in State v. Treasurer, 4 S.C. 525 (1873), State v. Gailland, 11 S.C. 310 (1878) and Chamblee v. Tribble, 23 S.C. 70 (1884). In 1878, the General Assembly enacted "an Act to Facilitate the Collection of Taxes" (1878 Stat. 785) which contained the language of what is now § 12-47-220. Such Act also contained the language of § 12-47-50 which now limits remedies in tax disputes to the remedies specified within Chapter 47 of Title 12, South Carolina Code of Laws, 1976, as amended. The Income Tax Act of 1926 (1927 Stat. 1) at § 31 and § 32 applies the limits on jurisdiction of § 12-47-10 and § 12-47- 50 to income taxes as well as authorizing jurisdiction over the payment under protest remedy of § 12-47-220. It should also be noted that Chapter 47 does contain a remedy at § 12-47-440 which allows a claim for refund to be filed, which after being denied entitles the taxpayer to recover his refund by a timely filed action in the state court.

jurisdictional limitations are applied in a uniform, nondiscriminatory manner against all remedies whether state or federal, South Carolina properly declined to entertain the § 1983 remedy.

C. The Supremacy Clause does not compel a state court to disregard its lack of jurisdiction over the § 1983 remedy so long as an adequate remedy is available under state law. As recently as 1944, Brown v. Gerdes, 321 U.S. 178, 64 S.Ct. 487, 493 (1944) (concurring opinion of Justice Frankfurter) explained that states are free to control their own jurisdiction and that no intent should be found that the Supremacy Clause mandates jurisdiction over a federal right in a state court. The leading case in which this Court has required a state court to entertain an

action alleging a constitutional violation even where there was a lack of jurisdiction in the state court is General Oil Co. v. Crain, 209 U.S. 211 (1908).

The plaintiff in Crain brought a suit in Tennessee seeking an injunction against a state official charged with enforcement of an inspection tax. The suit argued the tax was unconstitutional as a violation of interstate commerce and the Fourteenth Amendment. The Tennessee Supreme Court found it had no jurisdiction to issue the injunction since it was prohibited by statute. This court was presented with the argument that the case involved no federal question since it concerned only the jurisdiction of the courts of Tennessee and that Tennessee was the

final authority of that issue. This court concluded that it had jurisdiction over the matter since protection to a constitutional right could be lost if this Court had no right to review an action which would be denied review in the federal courts under the Eleventh Amendment and also denied in the state court. Thus the review by this court was granted because the plaintiff had no other remedy, and unless review was allowed, the constitutional claim would have been lost. That this conclusion is correct is supported by the case of Georgia R. R. & Banking Co. v. Musgrove, 335 U.S. 900 (1949).

In Musgrove, the plaintiff asserted it had an exemption from state taxation granted to it by its charter from the state. The state threatened to assess

ad valorem taxes against the plaintiff who thereupon sought declaratory relief and an injunction against the proposed action. The plaintiff argued such action would be an impairment of obligation under its contract with the state as set forth in its charter. This Court dismissed the matter for lack of a federal question. Thus, under essentially identical facts as Crain, supra, the Musgrove court reached a different conclusion. The reason is that the court in Crain found there was no other remedy available for the plaintiff, whereas the court in Musgrove was aware that Georgia allowed a remedy of a suit for refund if the tax was actually assessed. The Court had previously held in Atchison, Topeka & Santa Fe Railway v. O'Connor, 233 U.S. 280, 285 (1912), that a taxpayer who is

relegated to a suit for refund of taxes has no constitutional complaint by being denied an injunction remedy against the collection of taxes.

Ward v. Love County, 253 U.S. 17 (1920), likewise shows that only where there is no adequate remedy in the state court will such court be required to hear a claim where there is no jurisdiction. In Ward, a federal statute provided an exemption from state taxation to members of the Choctaw Indian Tribe. A tax was illegally collected from the tribe members who then filed a suit to obtain a refund. However, the Oklahoma Supreme Court denied the refund suit for lack of jurisdiction since the taxes had been voluntarily paid and no statute authorized a remedy for taxes paid voluntarily. This Court reversed on the

grounds that the Fourteenth Amendment required a remedy. Thus again where the state court lacks jurisdiction, the state is required to entertain an action only where there is no adequate remedy.

An adequate remedy is provided in the instant case[29] and has been pursued by the petitioners in state courts under

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[29]South Carolina's payment under protest provisions were found to be an adequate remedy so as to prohibit the issuance of an injunction in City Council of Augusta v. Timmerman, 233 Fed. 216 (C.C.A. 4th) (1916). Further, South Carolina has consistently allowed a taxpayer to raise any and all Constitutional issues he desires in an action under § 12-47-220. See for example, Atkinson Dredging Co. v. Thomas, 226 S.C. 361, 223 S.E.2d 592 (1976) (due process); Newberry Mills, Inc. v. Dawkins, 259 S.C. 7, 190 S.E.2d 503 (1972) (equal protection); Shasta Beverages v. South Carolina Tax Commission, 293 S.E.2d 429 (1982) (interstate commerce) as well as the instant case of Spencer v. South Carolina Tax Commission, ___ S.C. ___, 316 S.E.2d 386 (1984) (privileges and immunities clause). It is this ability to raise any and all Constitutional

§ 12-47-220.[30] Such being the case, the state court provided an adequate remedy and is not compelled to entertain the federal claim since it is without jurisdiction under the ordinary law of the state.

II. The Literal Language Of § 1983 Does Not Demonstrate That A State Must Entertain An Action Brought Pursuant To That Section.

The beginning point of any determination of the requirements of a statute must begin with the literal language of the statute involved since where the meaning is clear there can be no construction.[31]

objections that assure an adequate remedy. Rosewell v. LaSalle National Bank, 450 U.S. 503, 101 S.Ct. 1221, 1229 (1981).

[30]Petition for Writ of Certiorari at page 3.

[31]Lewis v. United States, 92 U.S. 618, 23 L.Ed. 513 (1875).

Section 1983 provides as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

The language gives no guidance as to whether a state is required to entertain such a suit. In fact, the statute says only that the offending person shall be liable. Thus, it provides only a remedy[32] without

[32]Chapman v. Houston Welfare Rights Organization, 441 U.S. 601, 617-618, 99 S.Ct.1905, 1916 (1979).

designating where that remedy may be obtained. Such ambiguity could give rise to several conclusions[33] and it is this fact of various conclusions which demonstrates a need for statutory construction to determine the intent of Congress.[34]

III. Congressional Intent Does Not Demonstrate That Section 1983 Compels A State To Entertain Actions Concerning State Income Taxes.

The intent behind § 1983 as it relates to compelling state courts to entertain suits concerning state taxes

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[33]Such conclusions could be that jurisdiction is vested solely in the federal courts (such conclusion has been found incorrect under Martinez, supra, and Maine v. Thiboutot, supra); jurisdiction is concurrent but actions are permissive in the state; actions are mandatory in the state in all events; or actions are mandatory in the state except for "valid excuses". (See for example Douglas v. N.Y., N.H. & H.R.R., 279 U.S. 386-387 (1929).)

[34]Philbrook v. Glodgett, 421 U.S. 707, 95 S.Ct. 1893 (1975).

may be examined through the legislative history of § 1983 and other statutes relevant to state tax systems. Also an intent of Congress to intrude into a traditional and fundamental state function should be found only where there is a clear statement manifesting such intent. These approaches in determining the use of § 1983 concerning state income taxes will be shown below to demonstrate Congress had no intention of making such suits mandatory in state courts.

A. The legislative history of § 1983 cannot be read to find an intent requiring states to entertain claims concerning state income taxes. An extensive review of the history of § 1983 has been developed in Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473 (1961).

Monroe explains that § 1983 grew

out of a message to Congress from President Grant on March 23, 1871. The message, warranted by evidence of the violence caused by the Ku Klux Klan, urged the passage of legislation which would secure "life, liberty and property and the enforcement of law in all parts of the United States". Monroe, supra, at 476, 477. The legislation known as the Ku Klux Act was directed at those who represented a state in some capacity who were either unable or unwilling to enforce state law. Monroe, supra, at 478.

During the debates, several purposes of Section 1 of the Act, now § 1983, were developed. First, it had the purpose of overriding certain kinds of state laws. This encompassed those laws which were passed by states with the purpose of infringing upon the rights of

citizens. The second purpose was to provide a remedy where state law was inadequate. Such laws were those which were insufficient to correct a wrong. The third purpose of § 1983 was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice. These were laws which were proper protections for citizens but were not available in any practical sense since they were unenforced by the states. Monroe, supra at 478.

Monroe found that the primary purpose of § 1983 was to "afford a federal right in federal courts" since it was established that even adequate rights available at state law were of little value due to such not being enforced. Monroe then held:

> "It is no answer that the state has a law which if

> enforced would give relief. The federal remedy is supplementary to the state remedy and the latter need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court." Monroe, supra, at 482.

Thus, it is established that Congress in § 1 of the 1871 Act was attempting to establish a federal court for offenses that prior to such Act would have been matters heard in state courts under state remedies.

The view that § 1983 was primarily motivated to the providing of a federal forum was further substantiated by a review of the legislative history of § 1983 in Patsy v. Board of Regents of State of Florida, 457 U.S. 496, 102 S.Ct. 2557 (1982). There, this Court

found first that in passing § 1 of the 1871 Act, Congress intended to "throw open the doors of the United States court" to individuals within the scope of the Act. Patsy at 2562. Second, this court found that Congress believed the fact-finding process in state courts was inadequate and that a federal court would be less susceptible to local prejudice. Patsy at 2563. Finally, Patsy found that the legislative history indicated some perceptions of legislators that the Act allowed concurrent jurisdiction. Patsy at 2563. However, such a view does not give any indication that such legislators believed the Act was mandatory on state courts.

The legislative history demonstrates that Congress did not intend to make § 1983 claims mandatory

upon state courts. Had Congress intended to accomplish such a result it is reasonable to believe that the issue would have been extensively debated. Given the significant legislative history addressed to providing a federal remedy in a federal court, there is no intent expressed to make § 1983 a mandatory remedy in the state courts.

B. The extent to which § 1983 was intended by Congress to create in the state courts a mandatory remedy concerning state taxes may be found by reviewing subsequent congressional enactments. Since in construing a statute it is always proper to presume Congress is aware of the law[35] and to examine statutes which deal with the

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[35] Cannon v. University of Chicago, 441 U.S. 667, 99 S.Ct. 1946, 1957-1958 (1976).

same subject of state taxation for which § 1983 is now being asserted, it is instructive to review the legislative history of two enactments to determine if such are consistent with the view that § 1983 created a mandatory state tax remedy. These enactments are the Tax Injunction Act[36] and the State and Local Fiscal Assistance Act of 1972, Title II, § 202(a) of Public Law 92-512.[37]

1. The Tax Injunction Act (hereinafter § 1341) gives no indication that Congress was aware of § 1983 creating a mandatory state tax remedy in state courts. The legislative history of § 1341 demonstrates that Congress was concerned about inequities brought about by foreign corporations obtaining

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[36] 28 U.S.C. § 1341.

[37] 26 U.S.C. §§ 6361-6365.

injunctions against state taxes.[38] Such corporations could establish diversity jurisdiction and obtain an injunction in federal court to prohibit the collection of state taxes whereas local citizens were forced to pay the tax first and then litigate. Section 1341 was designed to correct this problem.

It is ironic that finding § 1983 to be mandatory will give precisely the result § 1341 was meant to cure. If a taxpayer is able to structure his complaint so as to come within a mandatory § 1983 claim, South Carolina's anti-injunction statute of § 12-47-10 would fall under the Supremacy Clause and such taxpayer could litigate his tax dispute without first paying. All other

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[38] S. Rep. No. 1035, 75th Cong., 1st. Sess., 2 (1937).

South Carolina income taxpayers would have to pay before being able to litigate. The effect of such an approach would directly contradict what Congress clearly intended in § 1341. As this court has recognized, if the remedy sought by the taxpayer was available:

> "* * * state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the * * * suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget and perhaps a shift to the State of the risk of taxpayer insolvency." Perez v. Ladesma, 401 U.S. 82, 128 n. 17, 91 S.Ct. 674, 699 n. 17 (1971) (Justice Brennan concurring in part and dissenting in part.)

The legislative history of § 1341 demonstrates that Congress was aware of the state's requirement that taxpayers pursue administrative remedies before

being able to litigate.[39] Grace Brethren Church, supra, concluded that congressional intent was that a remedy in state court was plain, speedy and efficient even though administrative and judicial remedies had to be pursued.[40] Again it is ironic that in spite of this congressional recognition, a mandatory § 1983 in state courts yields exactly the opposite of what Congress intended in § 1341. This is so since Patsy, supra, provides that no exhaustion of administrative remedies is required in § 1983 suits. Thus again, a taxpayer who

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[39] California v. Grace Brethren Church, 102 S.Ct. 2498 (1982), identifies the Johnson Act dealing with utilities as being the basis for § 1341. S. Rep. No. 125 73d Cong., 1st Sess., 3 (1933), shows that Congress required utilities to pursue their administrative and judicial remedies.

[40] Grace Brethren Church, supra, at 2512.

is able to structure his complaint within § 1983 would effectively bypass all required administrative steps.[41]

In short, § 1341's history shows that Congress was well aware of the states' methods of collecting first and requiring suit later and of the states'

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[41] Such would result in chaos in state taxation. In South Carolina, the cases of Columbia Developers Inc. v. Elliott, 269 S.C. 486, 238 S.E.2d 169 (1977), and Meredith v. Elliott, 247 S.C. 335, 147 S.E.2d 244 (1966), require administrative exhaustion in property tax matters. In 1981 (the year this action began) the South Carolina Tax Commission had 76,877 business personal property tax returns and made 5,109 real property assessments, according to the Tax Commission's 67th Annual Report. In addition, literally thousands of assessments are made by county tax officials which likewise are subject to the exhaustion rule. If such taxpayers bypassed local review boards or the review by the South Carolina Tax Commission, the South Carolina courts would unnecessarily be overburdened.

requirement of exhaustion of administrative remedies. It enacted § 1341 to prohibit an abuse by foreign corporations using injunctions to defeat the states' tax scheme. It is directly contrary to this expressed congressional consent to such a system to now conclude that § 1983 is mandatory upon the states in tax disputes. To so conclude would allow taxpayers to disregard and ignore state rules protecting collection of vital state taxes and to allow disputes to be settled by injunction and to deny the administrative exhaustion requirement.

2. In the State and Local Fiscal Assistance Act, (hereinafter the Act) Congress again expressed intent that supports the conclusion that § 1983 is not mandatory. The Act provides for an elective state tax collection system

administered by the Internal Revenue Service. Congress identified the judicial remedies that would be available for suits by the state taxpayer. It is significant to note Congress' intent not to intrude into the states' affairs.

Senate Report No. 92-1050 explains that the tax collection system is voluntary and nothing in the Act is to be construed as requiring the state to participate.[42] Likewise, those who do participate are assured that the "principles of federalism" require that state constitutional matters will still be litigated by the state in its own court.[43]

This congressional intent is in

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[42] U.S. Cong. and Adm. News, p. 3874, 3915-3916.

[43] Ibid at page 3917.

conflict with that of the view that Congress intended § 1983 to be mandatory. In the Act, voluntary consent is the rule but under § 1983, as presented by petitioners, compulsion is the rule. Such conflict indicates § 1983 was never intended by Congress to be mandatory.

C. To find an intent by Congress to require state courts to entertain § 1983 claims concerning state income taxes intrudes into a fundamental state function and thus requires a clear statement of such intent. Since there is no clear expressed statement by Congress of mandatory state hearings for § 1983, no mandatory hearing of such claim for income taxes should be found. The general rule is well established that whenever a view of a statute is taken which either significantly changes

the federal-state balance[44] or abrogates the state's sovereign immunity[45] a clear statement of such intent is required. In the instant case, a mandatory § 1983 would change the federal-state balance by allowing a federal remedy for tax disputes to displace state remedies and abrogate the state's sovereign immunity protected in the concept of federalism. Each of these positions will be addressed in turn.

1. A federal statute which would create a remedy for state tax disputes would constitute a major shift in the

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[44] United States v. Bass, 404 U.S. 336, 92 S.Ct. 515 (1971).

[45] Quern v. Jordan, 440 U.S. 332, 99 S.Ct. 1139 (1979); Fitzpatrick v. Bitzer, 427 U.S. 445, 96 S.Ct. 2666 (1976); Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347 (1974); Employees v. Department of Public Health and Welfare, 411 U.S. 279, 93 S.Ct. 1614 (1973).

federal-state balance. This Court has acknowledged that taxes are the lifeblood of government[46] and has repeatedly acknowledged the significance of taxation to the states. In Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 79 S.Ct. 437 (1959), this Court found the states have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests. Accordingly in arranging its affairs, the states are given wide latitude in creating its scheme of taxation. Challenges to a tax under the Equal Protection Clause are upheld without the state being required to "resort to close distinctions" or to "maintain a precise,

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[46] Bull v. United States, 295 U.S. 247, 55 S.Ct. 695 (1935).

scientific uniformity". This court held that any other position would "subject the essential taxing power of the state to an intolerable supervision hostile to the basic principles of our government". This view of respect for state tax systems was maintained in Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 93 S.Ct. 1001 (1973) and has been a consistent view of this Court as early as 1870.

> "It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of the government, and thereby cause serious detriment to the public." Dows v. City of Chicago, 11 Wall. 108, 110, 20 L.Ed. 65 (1870).

Not only this Court but also Congress has recognized the importance of state income tax systems. In the State and Local Fiscal Assistance Act of 1972[47], (hereinafter the Act) Congress provided for a method of collecting state taxes along with federal tax collections. Under the Act, any state that agreed to the collection scheme replaced its judicial procedures under state law with those procedures available to a federal taxpayer under Chapter 76 of the Internal Revenue Code and Title 28 of the United States Code. Under such a scheme, judicial remedies would then be in the federal and not the state courts. Congress recognized how

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[47]Public Law, 92-512; 86 Stat. 919; Title II, § 202(a), October 20, 1972, 86 Stat. 936, added subchapter E of the Internal Revenue Code of 1954, as amended §§ 6361-6365.

intrusive such an invasion of the state's sovereignty would be and thereby made the collection scheme completely elective as explained in the Senate Report.

> "It should be emphasized that this system is entirely voluntary for the States. The Federal Government will not collect a State's individual income taxes unless the State has chosen, in accordance with its constitutional procedures, to enact an income tax law that meets the provisions of the bill; and even then, not until after the State has notified the Secretary of the Treasury that it wishes the Federal Government to collect and administer the State's individual income taxes. In effect, then, this title of the bill merely offers a simplified and less expensive method for carrying out a policy determined by a State, e.g., a determination by the State to have an income tax and to conform the tax substantially to the Federal income tax. Nothing in the bill requires a State to have an income tax against its will; nothing in the bill requires a State to follow the Federal income tax against its

will if the State prefers a different income tax system." Senate Report No. 92-1050 as shown in 1972 U. S. Code Cong. and Adm. News, p. 3874, 3915-3916.

Congress was even further impressed with the sovereignty of the state by placing limitations on the broad invasion of state tax judicial remedies, where the State's Constitution was involved or where the United States might be a party. In those instances, Congress left the state judicial remedy open.

> "Generally, the Federal Government is to deal with taxpayers and appear in court on behalf of any State whose income tax is to be collected under these provisons, and to represent the State's interests in all administrative and judicial proceedings (civil and criminal) relating to the administration and collection of the State's individual income tax, in the same manner as it represents the interests of the United States in Federal income tax matters.

> However, the committee recognizes that the principles of federalism require that a State represent its own interests with respect to proceedings in a State court involving the constitution of that State and with respect to proceedings involving the relationship between the United States and the State. As a result, under the bill, the State, and not the Federal Government, will represent the interests of the State in these two matters." Ibid. at page 3917. (Emphasis added)

It is this very adherence to federalism and state sovereignty in its fundamental affairs that requires Congress to make a clear statement of its intent to alter the federal-state balance relating to state tax schemes.[48]

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[48] It is of course recognized that § 1983 was passed as a statute pursuant to the Fourteenth Amendment intended to cause a shift in federal-state relations. Mitchum v. Foster, 407 U.S. 225 (1972). However, that fact alone does not mean that Congress intended to require states to entertain claims seeking tax refunds in the absence of a clear statement to that effect.

Since no such intent is clearly expressed by Congress § 1983 cannot be found to be mandatory upon the states in tax disputes.

2. Congress did not intend to require state courts to entertain § 1983 claims where to do so would require abrogating sovereign immunity. Such abrogation can be accomplished only by a clear statement of Congress. No such statement is found in § 1983. In actions in the federal courts against a state, the Eleventh Amendment[49] provides sovereign immunity from suit.

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[49]The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

However, this immunity is not a complete bar in the federal courts since a party may enjoin a state official who is carrying out an unconstitutional statute while acting in his official capacity. Ex Parte Young, 201 U.S. 123, 28 S.Ct. 441 (1907). Thus, the state acting through the official can be enjoined.

Retroactive monetary relief is not allowed in federal courts since such is an action against the state to which the state may raise its immunity. Edelman v. Jordan, supra. However, this court has found that the bar of the Eleventh Amendment sovereign immunity can be removed when Congress is acting pursuant to a statute enacted under the grant of authority in § 5 of the Fourteenth Amendment. Such was the case in Fitzpatrick v. Bitzer, supra, where the removal of the sovereign immunity

and Eleventh Amendment bar was found based on an expressed "congressional intent" in Title VII of the Civil Rights Act of 1964 to abrogate such immunity.

Not every Congressional act contains the authorization to sue the state. In Quern v. Jordan, supra, this Court found that even though § 1983 was enacted pursuant to § 5 of the Fourteenth Amendment it did not abrogate the sovereign immunity of the state. This conclusion was reached because "§ 1983 does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States, * * *." Thus, § 1983 is not available for recovering retroactive monetary awards from a state.[50]

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[50]Quern involved an Eleventh Amendment immunity in the federal courts, but as will be developed, the conclusion Quern reached is also applicable to the sovereign immunity retained by the states as protected under the concept of federalism when states are sued in their own courts.

In the instant case, the respondents asserted in their appeal to the South Carolina Supreme Court, that this suit was barred due to sovereign immunity.[51] The petitioners asserted in their Brief that state sovereign immunity was no bar to their claim since state law was not controlling.[52] It is clear as developed below that under federal law the action in the instant matter is a suit against the state and is barred by sovereign immunity.

[51]Transcript of Record before the South Carolina Supreme Court as additional sustaining ground No. 5 at page 161.

[52]Consolidated appellants' and respondents' Brief of Respondents/Appellants at pages 19-21 as filed before South Carolina Supreme Court.

The parties sued in the instant case are identified as the South Carolina Tax Commission and three named Commissioners sued in their official capacity as Commissioners. The suit seeks a money judgment of $580. It is clear under Ford Motor Company v. Department of Treasury, 323 U.S. 459, 65 S.Ct. 347, 350 (1945) and Quern v. Jordan, supra, that suits to recover money from the state entitles the state to raise sovereign immunity. It is settled that the South Carolina Tax Commission is an agency of and tantamount to the state.[53] Likewise, since the Commissioners are sued in their official capacity[54] and a state

[53] Argent Lumber Co. v. Query, 178 S.C. 1, 182 S.E. 93, 95 (1935).

[54] The Commissioners are only nominal defendants since just as in Governor of

income tax payment is sought, it is clear that the funds for the judgment sought will be funds of the state rather than personal funds. Therefore, if South Carolina's sovereign immunity is available on the same level as South Carolina's Eleventh Amendment immunity in federal court then Quern v. Jordan, supra, would hold that § 1983 does not have the congressional authorization to allow suits against the state. If such is true, the § 1983 action was properly dismissed by the South Carolina Supreme Court. The remainder of this argument will demonstrate that South Carolina's

Georgia v. Mandrago, 1 Pet. 110 (1828), the judgment sought is not against the person but rather against the officer or the successor to the office. Such is fortified by the List of Parties identified at Page II of petitioners' Brief showing that Robert C. Wasson is no longer a party since his office has now been relinquished by him. Rather, his successor in his official capacity is a party.

sovereign immunity in its own court is a proper reason for dismissing the § 1983 claim.[55]

A state's sovereign immunity has constitutional magnitude and is a retained right of a state. Sovereign immunity was an important issue fully explored by the framers of the Constitution.[56] In explaining the reach

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[55] Although Hutto v. Finney, 437 U.S. 678, 98 S.Ct. 2565 (1978), indicates that the Eleventh Amendment is not available for protection in suits against the state in state courts, the concept of sovereign immunity which it embodies is an attribute of sovereignty retained by the states to be raised when the state is sued in its own courts.

[56] 1 C. Warner, The Supreme Court in United States History (1922 Ed.) at page 91 states:

> "* * * the existence of any [right of the Federal Judiciary to summons a State as a defendant] had been disclaimed by many of the most eminent advocates of the new Federal Government; and it was largely owing to their

of the Federal judicial power under Article III, § 2 of the United States Constitution, James Madison agreed that the States retained their sovereign immunity since "[I]t is not in the power of individuals to call any state into court".[57] This court has recognized the constitutional magnitude of sovereign immunity in several cases. In Hans v. Louisiana, 134 U.S. 1, 10 S.Ct. 504, 509 (1890) this court found:

> "It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign state from prosecution in a court of

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> successful dissipation of the force of the existence of such Federal power that the Constitution was finally adopted * * *."

[57] III Elliott, Debates in the Several State Conventions on the Adoption of the Federal Constitution.

> justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence."

The view of sovereign immunity was likewise earlier expressed in Cunningham v. Macon & Brunswick R R. Co., 109 U.S. 446, 3 S.Ct. 292, 293 (1883) as being accepted:

> "* * * as a point of departure unquestioned, that neither a state nor the United States can be sued as defendant in any court in this country without their consent except in the limited class of cases in which a state may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this court of the constitution."

Sovereign immunity has not only been recognized in earlier cases[58] of

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[58] Smith v. Reeves, 178 U.S. 436, 20 S.Ct. 919 (1900), Duhne v. New Jersey, 251 U.S. 311, 40 S.Ct. 154 (1920); Monaco v. Mississippi, 292 U.S. 313, 54 S.Ct. 1745 (1934).

this Court but also recognized recently in Pennhurst State School & Hospital v. Holderman, 104 S.Ct. 900 (1984). There this court found that the Eleventh Amendment was an affirmation of the fundamental principle of a state's sovereign immunity. Although Pennhurst involved immunity of a state in federal court, the same principle applies in the state court since as Alexander Hamilton explained in The Federalist No. 81 at page 602:

> "It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent. * * * Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states, * * *."

Here, South Carolina did not surrender its immunity. This is particularly true in light of the fact that the interpretation of § 1983 as

mandatory will intrude into the traditional and fundamental right of "the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interest * * *."[59]

In the instant case, the petitioners have attempted to sue the state since the action seeks a retroactive money judgment and names the South Carolina Tax Commission as a party and names the Commissioners as nominal defendants only in their official capacity. The state has not waived its immunity which immunity it is entitled to raise as a constitutionally retained right under the basic principle of federalism. Congress may have the authority to abrogate the state's

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[59] Allied Stores of Ohio, Inc., supra, at page 440.

immunity pursuant to appropriate legislation under § 5 of the Fourteenth Amendment where it does so by a clear statement. Since Quern v. Jordan, supra, holds that § 1983 "does not explicitly and by clear language" abrogate such immunity, the South Carolina Supreme Court properly refused to entertain the § 1983 claim.

CONCLUSION

The petitioners have asked this Court to find that § 1983 is mandatory upon state courts when such remedy is used in a state income tax dispute. Such a position would have the effect of dismissing South Carolina's jurisdictional limitations, disregarding the lack of any legislative intent in § 1983 concerning state tax systems and ignoring legislative intent in subsequent acts which leave the administration of state tax systems to the states. The petitioners' position would allow taxpayers to ignore existing adequate state remedies and bring actions involving taxes without having first paid the disputed taxes and thereby deprive the states of their vital revenues during the entire period

of litigation. Section 1983 and its history simply do not yield the evidence to support congressional intent to provide a mandatory federally-imposed state tax remedy in state court.

For the reasons expressed in this Brief, the decision of the South Carolina Supreme Court to decline to entertain the remedy sought under 42 U.S.C. § 1983 by the petitioners should be upheld and this matter ended.

T. TRAVIS MEDLOCK
Attorney General of S. C.

JOE L. ALLEN, JR.
Chief Deputy Attorney General

RAY N. STEVENS
Senior Assistant Attorney General
Attorneys for Respondents
Post Office Box 125
Columbia, South Carolina 29214

December 21, 1984

CERTIFICATE OF SERVICE

I hereby certify that on the 21 day of December, 1984, three (3) copies of a Brief For the Respondents were mailed by depositing same in the United States Post Office at Columbia, South Carolina, with first class postage prepaid, addressed to Henry L. Parr, Jr., Esq. and Eric B. Amstutz, Esq. as Counsel of Record for Petitioners, at Post Office Box 10207, 44 East Camperdown Way, Greenville, South Carolina, 29603.

RAY N. STEVENS
Post Office Box 125
Columbia, S. C. 29214
Attorney for Respondents

APPENDIX A

STATUTES INVOLVED IN ADDITION TO THOSE SET FORTH IN APPENDIX E TO PETITION AND IN BRIEF OF PETITIONERS.

26 U.S.C. 6361 provides in pertinent part:

> (a) Collection and administration. In the case of any State which has in effect an agreement with the Secretary entered into under section 6363, the Secretary shall collect and administer the qualified State individual income taxes of such State. No fee or other charge shall be imposed upon any State for the collection or administration of the qualified State individual income taxes of such State or any other State. All provisions of this subtitle, subtitle G, and chapter 24 relating to the collection and administration of the taxes imposed by chapter 1 on the incomes of individuals (and all civil and criminal sanctions provided by this subtitle or by title 18 of the United States Code with respect to such collection and administration) shall apply to the collection and administration of qualified State individual income taxes as if such taxes were imposed by chapter 1, except to the extent that their application is modified by the Secretary by regulations necessary or appropriate to reflect the provisions of this subchapter, or to reflect differences in the taxes

or differences in the situations in which liability for such taxes arises.

(b) Civil proceedings.-Any person shall have, with respect to a qualified State individual income tax (including the current collection thereof), the same right to bring or contest a civil action and obtain review thereof, in the same court or courts and subject to the same requirements and procedures, as he would have under chapter 76, and under title 28 of the United States Code, if the tax were imposed by section 1 (or were for the current collection of the tax imposed by section 1). To the extent that the preceding sentence provides judicial procedures (including review procedures) with respect to any matter, such procedures shall replace judicial procedures under State law, except that nothing in this subchapter shall be construed in any way to affect the right or power of a State court to pass on matters involving the constitution of that State.

(c) * * * .

(d) Special rules.-

(1) United States to represent State interest.-

(A) General rule.-In all administrative proceedings, and in all judicial proceedings (whether civil or criminal), relating to the administration and collection of a State qualified individual income tax the interests of the State imposing such tax shall be represented

by the United States in the same manner in which the interests of the United States are represented in corresponding proceedings involving the taxes imposed by chapter 1.

(B) Exceptions.-Subparagraph (A) shall not apply to-

(i) proceedings in a State court involving the constitution of that State, and

(ii) proceedings involving the relationship between the United States and the State.

* * * ."